

Commission. In the *Local Competition Order*, identified three differences between the purchase of unbundled elements and resale, and all three differences continue to be valid.⁵⁸

17. WorldCom contends that the Act and the Commission's rules make clear that the requesting carrier, purchasing unbundled local switching, is the sole provider of the local switching portion of interexchange access, regardless of the method of transport chosen by the interexchange carrier (IXC) to reach the unbundled local switch.⁵⁹ WorldCom suggests that NYNEX and Bell Atlantic do not contest this.⁶⁰ AT&T contends that, when a requesting carrier purchases the unbundled local switch and the unbundled loop, that requesting carrier is entitled to bill an IXC for the access services associated with those unbundled network elements when the competitive carrier's local customer initiates or receives an interexchange call carried by that IXC. AT&T also claims that the requesting carrier has the right to offer transport services to the IXC; it is, however, the IXC's decision as to which carrier it uses to provide access transport services.⁶¹

18. Responding to LECC's petition, WorldCom argues that, by tying the provision of shared transmission facilities to both local switching and tandem capabilities, the clarification sought by LECC is overbroad and would unnecessarily constrain the ability of requesting carriers to purchase access to shared transmission facilities between two end offices as a

⁵⁸ AT&T May 14 *Ex Parte*. First, according to AT&T, network element purchasers bear the risk if elements, such as the loop and the switch, are not profitably utilized by customers. Carriers purchasing end-to-end rebundled unbundled elements face the risk that their users will generate substantial switch usage costs on local calls (free usage), without generating significant interLATA traffic and associated revenue. Second, competitive carriers buying the end-to-end unbundled elements can use their elements to create services the incumbent does not offer, and thus increase competitive options to consumers. Finally, use of rebundled unbundled network elements fosters the growth of facilities-based competition because competitors can gradually introduce their own facilities in place of elements purchased from incumbents. AT&T contends that most large competitive carriers would prefer to own their own networks because it reduces their vulnerability to discrimination by the incumbent, and gives them greater control over their costs, network quality, and ability to provide new services in response to consumer demand. *Id.* See also WorldCom May 23 *Ex Parte* (combinations of network elements provide new entrants an entirely different competitive entry strategy than resale. Such combinations of network elements permit new entrants the opportunity to provide new service and price pressures on incumbent LECs).

⁵⁹ WorldCom Apr. 16 *Ex Parte*.

⁶⁰ WorldCom Apr. 16 *Ex Parte*.

⁶¹ Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, filed July 11, 1997.

network element.⁶² WorldCom further contends that such a transport regime would require that each requesting carrier that purchases dedicated trunks between end offices establish customized routing using new line class codes. According to WorldCom, this would lead to rapid line class code exhaustion.⁶³

III. DISCUSSION

19. On July 18, 1997, the United States Court of Appeals for the Eighth Circuit affirmed in part and vacated in part the Commission's *Local Competition Order*. We note, as a predicate to our discussion below, that the court affirmed the Commission's rulemaking authority to identify unbundled network elements. The court held that section 251(d)(2) of the Act expressly gave the Commission jurisdiction in this area.⁶⁴ We thus conclude that the Commission has authority to address, in this reconsideration order, the issues raised by petitioners concerning the extent to which "shared transport" should be provided as an unbundled element.

20. WorldCom filed a petition for clarification, and LECC filed a petition for reconsideration of the *Local Competition Order*; both petitions concerned the definition of shared transport as an unbundled network element. WorldCom filed a petition for clarification pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429, which set forth rules regarding petitions for reconsideration. In its petition WorldCom also stated that, "[s]hould the Commission not regard this petition as a request for clarification of the *Local Competition Order*, WorldCom requests that it be regarded as a petition for reconsideration."⁶⁵ We believe WorldCom's filing is more properly addressed as a petition for reconsideration, and treat it as such in this decision.

21. Parties disagree about what we required in the *Local Competition Order* with respect to shared transport. In addition, parties ask us to clarify or reconsider our decision regarding the provision of shared transport under section 251(c)(3). We first restate what we required in the *Local Competition Order*, and then reconsider certain aspects that may have been unclear or that were not addressed in the *Local Competition Order*. We then respond to

⁶² WorldCom Opposition at 3-5 (network cost and efficiency of both the incumbent and the requesting carrier would suffer because additional and unnecessary dedicated trunk groups would have to be created, raising the costs for competitors, and the incumbent's own trunk groups would operate less efficiently as new entrant's traffic is removed from trunk groups already sized to handle this traffic load).

⁶³ WorldCom Opposition at 5.

⁶⁴ *Iowa Utilities Bd.* at *32, n.10.

⁶⁵ WorldCom Petition at 1, fn 1.

arguments raised by parties that advocate a different approach to the provision of shared transport than our rules require.

22. We believe that the petitions for reconsideration have raised reasonable questions about the scope and nature of an incumbent LEC's obligation to offer shared transport as an unbundled network element, pursuant to section 251(c)(3) and our implementing regulations. We address these issues below. We also believe, however, some parties have argued that certain aspects of the rules adopted last August were ambiguous which, in our view, were clear. Specifically, in the *Local Competition Order*, we expressly required incumbent LECs to provide access to transport facilities "shared by more than one customer or carrier."⁶⁶ The term "carrier" includes both an incumbent LEC as well as a requesting telecommunications carrier. We, therefore, conclude that "shared transport," as required by the *Local Competition Order* encompasses a facility that is shared by multiple carriers, including the incumbent LEC. We recognize that the *Local Competition Order* did not explicitly state that an incumbent LEC must provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same facilities that an incumbent LEC uses for its traffic. We find, however, that a fair reading of our order and rules does not support the claim advanced by Ameritech that a shared network element necessarily is shared only among competitive carriers and is separate from the facility used by the incumbent LEC for its own traffic. Indeed, only Ameritech and US West suggest that the *Local Competition Order* could be interpreted to require sharing only between multiple competitive carriers.⁶⁷ Moreover, the fact that we required incumbent LECs to provide access to other network elements, such as signalling, databases, and the local switch, which are shared among requesting carriers and incumbent LECs is consistent with our view that transport facilities "shared by more than one customer or carrier" must be shared between the incumbent LECs and requesting carriers. Furthermore, with respect to local switching, we expressly rejected, in the *Local Competition Order*, a proposal that incumbent LECs could, or were required to, partition local switches before providing requesting carriers access to incumbent LEC switches under section 251(c)(3). We stated that "[t]he requirements we establish for local switch unbundling do not entail physical division of the switch, and consequently do not impose the inefficiency or technical difficulties identified by some commentators."⁶⁸ We thus required that shared portions of incumbent LEC switches would be shared by all carriers, including the incumbent LEC. Although we do not believe that the *Local Competition Order* was unclear as to this aspect of an incumbent LEC's obligation to provide shared transport, we take this opportunity to state explicitly that the *Local Competition Order* requires incumbent LECs to offer

⁶⁶ 47 C.F.R. § 51.319(d)(2)(i).

⁶⁷ See Ameritech Jan. 28. *Ex Parte*; US West Feb. 27 *Ex Parte*.

⁶⁸ *Local Competition Order*, 11 FCC Rcd at 15708, para. 416.

requesting carriers access, on a shared basis, to the same interoffice transport facilities that the incumbent uses for its own traffic.

23. We also conclude that the *Local Competition Order* was not ambiguous as to an incumbent LEC's obligation to offer access to the routing table resident in the local switch to requesting carriers that purchase access to the unbundled local switch.⁶⁹ The *Local Competition Order* made clear that requesting carriers that purchase access to the unbundled local switch may obtain customized routing, unless it is not technically feasible to provide customized routing from that switch. In those instances, a requesting carrier is limited to using the routing instructions in the incumbent LEC's routing table.⁷⁰ In so holding, we necessarily accepted the view that requesting carriers that take unbundled local switching have access to the incumbent LEC's routing table, resident in the switch. We find nothing in the *Local Competition Order* that supports the contention that requesting carriers that obtain access to unbundled local switching, pursuant to section 251(c)(3), do not obtain access to the routing table in the unbundled local switch.

24. The *Local Competition Order* did not clearly define certain aspects of incumbent LECs' obligation to provide access to shared transport under section 251(c)(3). In particular, we did not clearly and unambiguously (1) identify all portions of the network to which incumbent LEC must provide interoffice transport facilities on a shared basis; and (2) address whether requesting carriers may use shared transport facilities to provide exchange access service to IXCs for access to customers to whom they also provide local exchange service. We do so here on reconsideration.

A. Incumbent LECs' obligation regarding shared transport

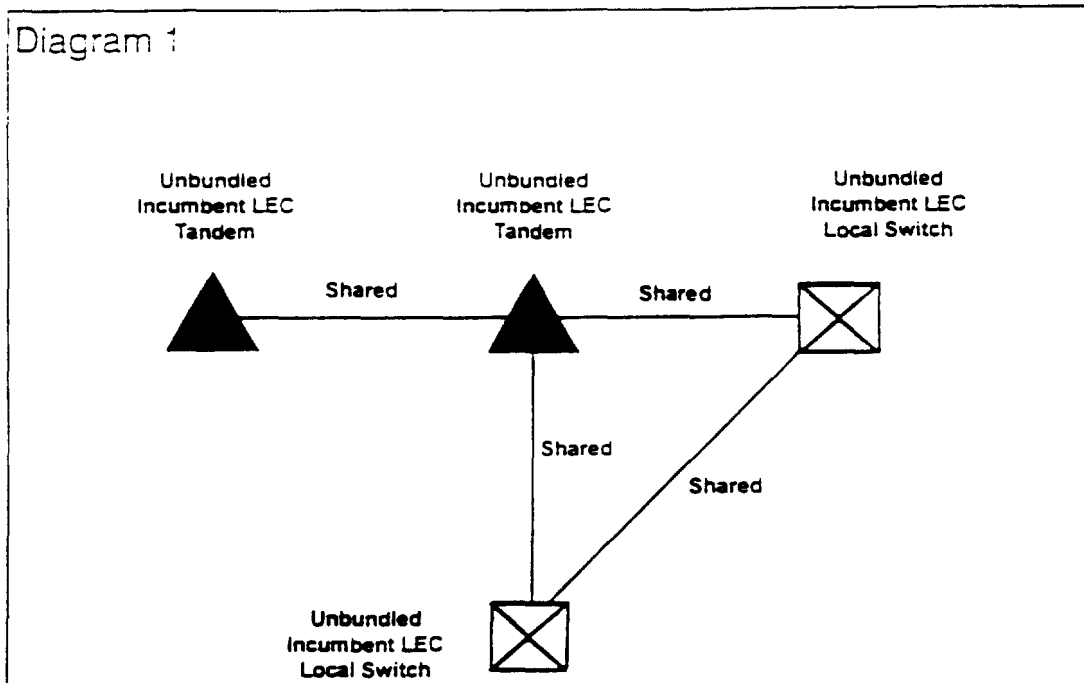
25. We conclude that the obligation of incumbent LECs to provide requesting carriers with access to shared transport extends to all incumbent LEC interoffice transport facilities, and not just to interoffice facilities between an end office and tandem. Thus, incumbent LECs are required to provide shared transport between end offices, between tandems, and between tandems and end offices).⁷¹

⁶⁹ Both end office and tandem switches contain routing tables, which provide information about how to route each call. The routing instructions notify the switch as to which trunks are to be used in transporting a call. Depending upon the availability of circuits, a call may be routed directly from the end office of the calling party to the called party's end office, or routed through a tandem switch.

⁷⁰ *Local Competition Order*, 11 FCC Rcd at 15706, para. 412.

⁷¹ See Diagram 1.

Diagram 1



26. The *Local Competition Order* expressly required "incumbent LECs to provide unbundled access to shared transmission facilities between end offices and the tandem switch."⁷² Parties disagree, however, about whether incumbent LECs are required to provide shared transport between end offices. As noted above,⁷³ there is a discrepancy between the rule that establishes the general obligation to provide shared transport as a network element, and the rule vacated by the court that purports to establish the pricing standard for shared transport.⁷⁴ To the extent that incumbent LECs already have transport facilities between end offices, and between tandems, the routing table contained in the switch most likely would

⁷² *Local Competition Order*, 11 FCC Rcd at 15718, para. 440. The Commission also stated in its rules that shared transmission facilities must be made available between "tandem switches and end offices." 47 C.F.R. § 51.509(d).

⁷³ See *supra* para. 9.

⁷⁴ 47 C.F.R. §§ 51.319(d) and 51.509(d). We note that the Eighth Circuit has held that the Commission lacked jurisdiction to adopt the pricing standard set forth in section 51.509(d), and accordingly vacated that section of the Commission's rules.

route calls between such switches.⁷⁵ We therefore conclude that there is no basis for limiting the use of shared transport facilities to links between end office switches and tandem switches. Limiting the definition of shared transport in this manner would not permit requesting carriers to utilize the routing tables in the incumbent LECs' switches. To the contrary, such a limitation effectively would require a requesting carrier to design its own customized routing table, in order to avoid having its traffic transported over the same interoffice facilities, connecting end offices, that the incumbent LEC use to transport its own interoffice traffic. Moreover, in the *Local Competition Order*, we held that it is technically feasible to provide access to interoffice transport facilities between end offices and between end offices and tandem switches.⁷⁶ No new evidence has been presented in this proceeding to convince us that our earlier conclusion regarding technical feasibility was incorrect.⁷⁷

27. We further clarify in this order that incumbent LECs are only required to offer *dedicated* transport between their switches, or serving wire centers, and requesting carriers' switches. Our *Local Competition Order* was not absolutely clear as to whether incumbent LECs must provide dedicated or shared interoffice transport between incumbent LEC switches, or serving wire centers, and switches owned by requesting carriers. In the *Local Competition Order*, we required incumbent LECs to "provide access to *dedicated transmission*

⁷⁵ In fact, incumbent LECs would have to *modify* their routing tables in order to prevent calls from being routed between end offices or between tandems.

⁷⁶ *Local Competition Order*, 11 FCC Rcd at 15719, paras. 442 and 443.

⁷⁷ Among incumbent LECs, only Ameritech, in various *ex parte* submissions, asserts that its switches are unable to "provide precise usage data or originating carrier identity for terminating local usage, or to identify terminating access usage with the called number." In essence, Ameritech contends that it is unable to accurately bill for the use of shared transport, including exchange access. Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, July 15, 1997 (Ameritech July 15 *Ex Parte*) attaching Reply Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan at 22-23 (Ameritech 271 Michigan Application Reply). As we held in our *Local Competition Order*, however, a determination of technical feasibility does not include consideration of billing concerns. 47 CF.R. §51.5. *Accord Iowa Utilities Bd.* at *21. Moreover, as noted above, Ameritech is the only party to contend that it is not currently able to measure and bill for shared transport. In contrast, Bell Atlantic, NYNEX, and PacTel have stated that they offer shared transport in conjunction with unbundled local switching. Letter from Patricia E. Koch, Assistant Vice President - Government Relations - FCC, Bell Atlantic, to William F. Caton, Acting Secretary, FCC, August 4, 1997. Letter from G.R. Evans, Vice President Federal Regulatory Affairs, NYNEX, to William F. Caton, Acting Secretary, FCC, July 18, 1997; Letter from M.E. Garber, Senior Counsel, Pacific Telesis, to William F. Caton, Acting Secretary, FCC, Mar. 3, 1997. In any event, we note that Ameritech has stated in another proceeding that it has proposed a settlement mechanism as an interim solution until it develops a long-term solution. Ameritech 271 Michigan Application Reply, CC Docket No. 97-137, at 22. Ameritech has also stated that it "is operationally capable of furnishing the 'platform' (unbundled local switching and shared transport) upon request." Ameritech 271 Michigan Application Reply, CC Docket No. 97-137, at 23. We thus find no evidence that it is not technically feasible to provide shared transport.

facilities between LEC central offices or between end offices and those of competing carriers."⁷³ This could be read to suggest that incumbent LECs are only required to provide dedicated (but not shared) interoffice transport facilities between their end offices, or serving wire centers, and points in the requesting carrier's network. The rule that defines interoffice transmission facilities, however, is less clear, and could be read to require incumbent LECs to provide shared transport between incumbent LECs' switches, or serving wire centers, and requesting carriers' switches.⁷⁹

28. We therefore clarify here that incumbent LECs must offer only *dedicated transport*, and not shared transport, between their switches, or serving wire centers, and requesting carriers' switches, as set forth in the *Local Competition Order*. We also note that the *Local Competition Order* expressly limited the requirement to provide unbundled interoffice transport facilities to *existing* incumbent LEC facilities.⁸⁰

29. On reconsideration, we further clarify that incumbent LECs are not required to provide shared transport between incumbent LEC switches and serving wire centers.⁸¹ We stated above that shared transport must be provided between incumbent LEC switches. Serving wire centers are merely points of demarcation in the incumbent LEC's network, and are not points at which traffic is switched. Traffic routed to a serving wire center is traffic dedicated to a particular carrier. We thus conclude that unbundled access to the transport links between incumbent LEC switches and serving wire centers must only be provided by incumbent LECs on a *dedicated* basis.⁸²

⁷³ *Local Competition Order*, 11 FCC Rcd at 15718, para. 440 (emphasis added).

⁷⁹ 47 C.F.R. 51.319(d)(1) states:

Interoffice transmission facilities are defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

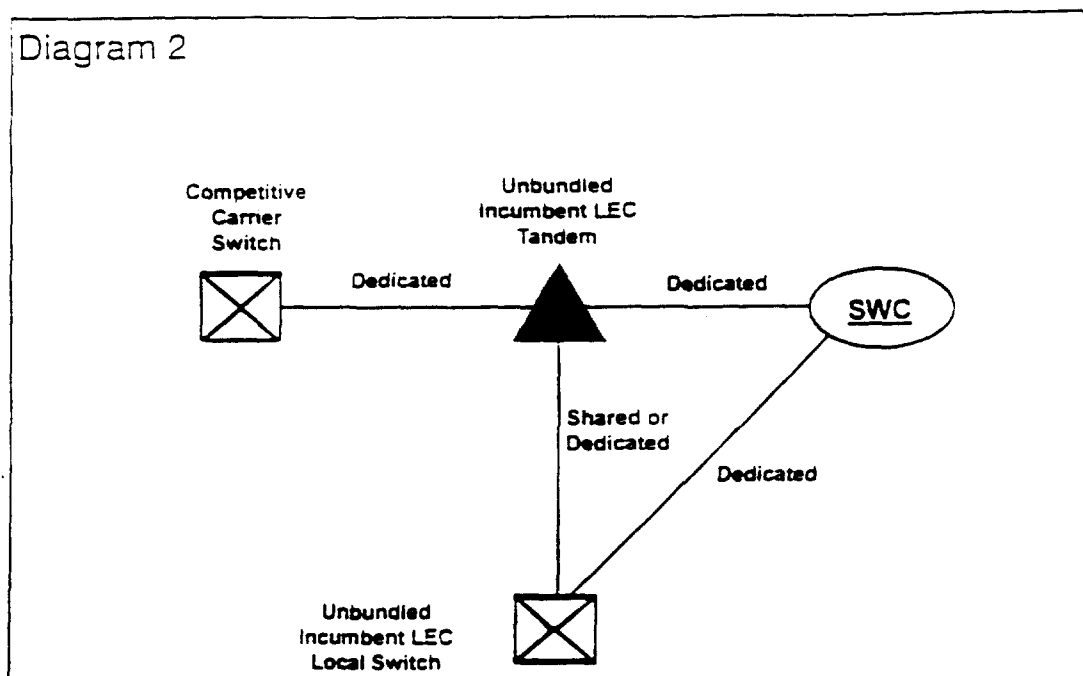
47 C.F.R. 51.319(d)(1).

⁸⁰ *Local Competition Order*, 11 FCC Rcd at 15722, para. 451.

⁸¹ We note that this clarification finds some support in the *Local Competition Order*, where we concluded that: "[t]his requirement [that incumbent LECs provide access to dedicated transmission facilities] includes, at a minimum, interoffice facilities between end offices and serving wire centers . . ." *Local Competition Order* at 15718, para 440.

⁸² See Diagram 2.

Diagram 2



30. Finally, we note that, traditionally, shared facilities are priced on a usage-sensitive basis, and dedicated facilities are priced on a flat-rated basis. We believe that this usage-sensitive pricing mechanism provides a reasonable and fair allocation of cost between the users of shared transport facilities. For example, in the *Access Charge Reform Order*, specifically the sections dealing with rate structure issues for interstate access charges, we required that the cost of switching, a shared facility, be recovered on a per minute of use basis, while the cost of entrance facilities, which are dedicated to a single interexchange carrier, be recovered on a flat-rated basis.⁴³ We note that several state commissions, in proceedings conducted pursuant to section 252 of the Act, have required incumbent LECs to offer shared transport priced on a usage-sensitive basis.⁴⁴ We acknowledge that, under the Eighth Circuit's decision, we may not establish pricing rules for shared transport. However, in situations where the Commission is required to arbitrate interconnection agreements

⁴³ Access Charge Reform, First Report and Order, CC Docket 96-262, FCC 97-158 (rel. May, 16, 1997) (*Access Charge Reform Order*) at paras. 135, 153.

⁴⁴ See, e.g., Michigan Public Service Commission, Case No. U-11280, July 14, 1997, Order at 26; Public Service Commission of Wisconsin, Case No. 6720-TI-120, Findings of Fact, Conclusions of Law, and Second Order, May 30, 1997.

pursuant to subsection 252(e)(5), we intend to establish usage-sensitive rates for recovery of shared transport costs unless parties demonstrate otherwise.⁸⁵

B. Application of the requirements of section 251(d)(2) to shared transport

31. Shared transport, as defined in this order, satisfies the two-prong test set forth in section 251(d)(2) of the Act. Section 251(d)(2) requires the Commission, in determining what network elements should be made available under section 251(c)(3), to consider "at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."⁸⁶ In the *Local Competition Order*, we held that an incumbent could refuse to provide access to a network element pursuant to section 251(d)(2) only if the incumbent LEC demonstrated that "the element is proprietary and that gaining access to that element is not necessary because the competing provider can use other, nonproprietary elements in the incumbent LEC's network to provide service."⁸⁷ We further held that, under section 251(d)(2)(B), we must consider "whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."⁸⁸ The Eighth Circuit affirmed the Commission's interpretation of section 251(d)(2).⁸⁹

32. In the *Local Competition Order*, we concluded that, with respect to transport facilities, "the record provides no basis for withholding these facilities from competitors based on proprietary considerations."⁹⁰ We also concluded that section 251(d)(2)(B) requires incumbent LECs to provide access to shared interoffice facilities and dedicated interoffice facilities.⁹¹ With respect to the unbundled local switch, we held that, even assuming that

⁸⁵ See 47 U.S.C. § 252(e)(5). See also *Local Competition Order*, 11 FCC Rcd at 16127-32, paras. 1283-95 (giving notice of certain minimum procedural rules and substantive standards that the Commission will use if it assumes jurisdiction pursuant to section 252(e)(5)).

⁸⁶ 47 U.S.C. § 251(d)(2).

⁸⁷ *Local Competition Order*, 11 FCC Rcd at 15710, para. 419. See also *id.* at 15642, para. 283.

⁸⁸ *Local Competition Order*, 11 FCC Rcd at 15643, para. 285.

⁸⁹ *Iowa Utilities Bd. v. FCC*, at *22-24.

⁹⁰ *Local Competition Order*, 11 FCC Rcd at 15720, para. 446.

⁹¹ *Local Competition Order*, 11 FCC Rcd at 15720-21, para. 447.

switching may be proprietary, at least in some respects. "access to unbundled local switching is clearly 'necessary' under our interpretation of section 251(d)(2)(A)."⁹² We also concluded that a requesting carrier's ability to offer local exchange service would be "impaired, if not thwarted," without access to the unbundled local switch, and therefore, that section 251(d)(2)(B) requires incumbent LECs to provide access to the unbundled local switch.⁹³

33. Upon reconsideration, we herein affirm that incumbent LECs are obligated under section 251(d)(2) to provide access to shared transport, as we here define it, as an unbundled network element. Parties in the record have not contended that interoffice transport facilities are proprietary, and we have no basis for modifying our prior conclusion that interoffice transport facilities are not proprietary. Thus, there is no basis under section 251(d)(2)(A) for incumbent LECs to refuse to provide interoffice transport facilities on a shared as well as a dedicated basis.

34. We also note that the failure of an incumbent LEC to provide access to all of its interoffice transport facilities on a shared basis would significantly increase the requesting carriers' costs of providing local exchange service and thus reduce competitive entry into the local exchange market. In the *Local Competition Order*, we observed that:

By unbundling various dedicated and shared interoffice facilities, a new entrant can purchase *all* interoffice facilities on an unbundled basis as part of a competing local network, or it can combine its own interoffice facilities with those of the incumbent LEC. The opportunity to purchase unbundled interoffice facilities will decrease the cost of entry compared to the much higher cost that would be incurred by an entrant that had to construct all of its own facilities. An efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities.⁹⁴

We continue to find the foregoing statements to be true with respect to shared as well as dedicated transport facilities. Requesting carriers should have the opportunity to use *all* of the incumbent LEC's interoffice transport facilities. Moreover, the opportunity to purchase transport facilities on a shared basis, rather than exclusively on a dedicated basis, will decrease the costs of entry.

⁹² *Local Competition Order*, 11 FCC Rcd at 15710, para. 419. In the *Local Competition Order*, we defined "necessary" in this specific context as meaning "that an element is a prerequisite for competition." *Id.* at para. 282. We also note that the Eighth Circuit affirmed this definition. *Iowa Utilities Bd.* at *22-23.

⁹³ *Local Competition Order*, 11 FCC Rcd at 15710-11, para. 420.

⁹⁴ *Local Competition Order*, 11 FCC Rcd at 15718-19, para. 441 (emphasis added).

35. We believe that access to transport facilities on a shared basis is particularly important for stimulating initial competitive entry into the local exchange market, because new entrants have not yet had an opportunity to determine traffic volumes and routing patterns. Moreover, requiring competitive carriers to use dedicated transport facilities during the initial stages of competition would create a significant barrier to entry because dedicated transport is not economically feasible at low penetration rates. In addition, new entrants would be hindered by significant transaction costs if they were required to continually reconfigure the unbundled transport elements as they acquired customers. We note that incumbent LECs have significant economies of scope, scale, and density in providing transport facilities. Requiring transport facilities to be made available on a shared basis will assure that such economies are passed on to competitive carriers. Further, if new entrants were forced to rely on dedicated transport facilities, even at the earliest stages of competitive entry, they would almost inevitably miscalculate the capacity or routing patterns. We recognize, however, that the need for access to all of the incumbent LEC's interoffice facilities on a shared basis may decrease as competitive carriers expand their customer base and have an opportunity to identify traffic volumes and call routing patterns. We therefore may revisit at a later date whether incumbent LECs continue to have an obligation, under section 251(d)(2), to provide access to all of their interoffice transmission facilities on a shared, usage sensitive basis.⁹⁵

36. As noted above, although interoffice transport, as we define the element pursuant to section 251(c)(3), refers to the transport links in the incumbent LEC's network, access to those links on a shared basis effectively requires a requesting carrier to utilize the routing table contained in the incumbent LEC's switch. Ameritech contends that the routing table contained in the switch, which is used in conjunction with shared transport, is proprietary. Ameritech and other incumbent LECs further allege that requesting carriers may obtain the functional equivalent of shared transport either by purchasing transport as an access service, or by purchasing dedicated transport facilities. These parties thus contend that, under section 251(d)(2)(A), incumbent LECs are not required to provide shared transport (including use of the routing table contained in the switch) as a network element.

37. Issues regarding intellectual property rights associated with network elements are before us in a separate proceeding.⁹⁶ For purposes of this Order only, we therefore assume without deciding that the routing table is proprietary. We nevertheless conclude that section

⁹⁵ We note that, if, in the future, competitive carriers gain sufficient market penetration to justify obtaining dedicated transport facilities, either through the use of unbundled elements or through building their facilities, shared transport may no longer meet the section 251(d)(2) requirements. In that event, the Commission can evaluate at that time whether incumbent LECs must continue to provide access to shared transport as a network element.

⁹⁶ See MCI Petition for Declaratory Ruling, CC Docket No. 96-98, CCB Pol. 97-4 (Mar. 11, 1997).

251(d)(2) requires an incumbent LEC to provide access to both its interoffice transmission facilities and to the routing tables contained in the incumbent LEC's switches.⁹⁷ We affirm our finding in the *Local Competition Order* that transport provided as part of access service, or as a wholesale usage service, is not a viable substitute for shared transport as a network element.⁹⁸ All incumbent LECs are not required to offer transport as an access service on a stand alone basis. Only Class A carriers are required, under our *Expanded Interconnection* rules, to unbundle interstate transport service.⁹⁹ Moreover, transport service that incumbents offer under the *Expanded Interconnection* tariffs may include only interstate transport facilities (transport provided either via a tandem switch or direct trunked between a local switch and the serving wire center), not interoffice transport facilities directly connecting two local switches. In the *Local Competition Order*, moreover, we expressly rejected the suggestion that requesting carriers "are not impaired in their ability to provide a service . . . if they can provide the proposed service by purchasing the service at wholesale rates from a LEC."¹⁰⁰

C. Use of shared transport facilities to provide exchange access service

38. In this order on reconsideration, we clarify that requesting carriers that take shared or dedicated transport as an unbundled network element may use such transport to provide interstate exchange access services to customers to whom it provides local exchange service. We further clarify that, where a requesting carrier provides interstate exchange access services to customers, to whom it also provides local exchange service, the requesting carrier is entitled to assess originating and terminating access charges to interexchange carriers, and it is not obligated to pay access charges to the incumbent LEC.

39. In the *Local Competition Order*, we held that, if a requesting carrier purchases access to a network element in order to provide local exchange service, the carrier may also use that element to provide exchange access and interexchange services.¹⁰¹ We did not impose any restrictions on the types of telecommunications services that could be provided over network elements. We did not specifically consider in the *Local Competition Order*,

⁹⁷ The Eighth Circuit recognized that "the Act itself expressly contemplates that requesting carriers will have access to network elements that are proprietary in nature." *Iowa Utilities Bd.* at *32, n.37.

⁹⁸ See *Local Competition Order*, 11 FCC Rcd at 15721, para. 448.

⁹⁹ Class A carriers are those exchange carriers that have more than \$100 million in total company regulated revenues. 47 C.F.R. §§ 32.11(a)(1), 32.9000.

¹⁰⁰ *Local Competition Order*, 11 FCC Rcd at 15643-44, para. 286. See also *id.* at 15644, para. 287. See also *Iowa Utilities Bd.* at *21 (stating that the fact that a capability may be available as a service does not necessarily preclude that capability from being available as a network element).

¹⁰¹ *Local Competition Order*, 11 FCC Rcd at 15679, para. 356.

however, whether a requesting carrier may use interoffice transport to provide exchange access service. We conclude here that a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service.¹⁰² We find that this is consistent with our initial decision.¹⁰³

D. Response to Specific Arguments Raised by Parties

40. As discussed above, we define the unbundled network element of shared transport under section 251(c)(3) as interoffice transmission facilities, shared between the incumbent LEC and one or more requesting carriers or customers, that connect end office switches, end office switches and tandem switches, or tandem switches, in the incumbent LEC's network. We exclude from this definition interoffice transmission facilities that connect an incumbent LEC's switch and a requesting carrier's switch, and those connecting an incumbent LEC's end office switch, or tandem switch, and a serving wire center. This definition of shared transport assumes the interconnection point between the two carriers' networks, pursuant to section 251(c)(2), is at the incumbent LEC's switch. This definition is consistent with the statutory definition of network elements, which defines a network element as a facility or equipment used in the provision of a telecommunications service, including the features, functions, and capabilities provided by means of such facility or equipment.¹⁰⁴

41. As an initial matter, we reject Ameritech's contention that, by definition, network elements must be partly or wholly dedicated to a customer.¹⁰⁵ To the contrary, we held in the *Local Competition Order* that some network elements, such as loops, are provided exclusively to one requesting carrier, and some network elements, such as interoffice transport provided on a shared basis, are provided on a minute-of-use basis and are shared with other carriers.¹⁰⁶ In the *Local Competition Order*, we also identified signalling, call-related databases, and the

¹⁰² We issue a further notice of proposed rulemaking below seeking comment on whether carriers may use dedicated and shared unbundled transport facilities to carry originating to, and terminating access traffic from, customer to whom the requesting carrier does not also provide local exchange service. See *infra* paras. 51-52.

¹⁰³ See, e.g., *Local Competition Order*, 11 FCC Rcd at 15679, para. 356 (section 251(c)(3) permits interexchange carriers and all other requesting telecommunications carriers, to purchase unbundled elements for the purpose of offering exchange access services). See also NYNEX July 18 *Ex Parte* (recognizing that, when a requesting carrier "wins a local service customer," and uses an unbundled network element such as shared transport to serve that customer, that the carrier "is entitled to use that same element to provide other telecommunications services, such as exchange access, to IXCs.")

¹⁰⁴ 47 U.S.C. § 153(29).

¹⁰⁵ See Ameritech Reply at 19.

¹⁰⁶ *Local Competition Order*, 11 FCC Rcd at 15631, para. 258.

switch, as network elements that necessarily must be shared among the incumbent and multiple competing carriers.¹⁰⁷

42. We also reject Ameritech's and BellSouth's contention that, because WorldCom and other requesting carriers seek access to an element -- shared transport -- that cannot be effectively disassociated from another element -- local switching, the requesting carriers are in fact seeking access to a bundled service rather than to transport as a network element unbundled from switching.¹⁰⁸ As previously discussed, several of the network elements we identified in the *Local Competition Order* depend, at least in part, on other network elements. In particular, although we identified the signalling network as a network element, the information necessary to utilize signalling networks resides in the switch, which we identified as a separate network element. In addition, we required incumbent LECs, upon request, to provide access to unbundled loops conditioned to provide, among other things, digital services such as ISDN, even though the equipment used to provide ISDN service typically resides in the local switch, rather than in the loop.¹⁰⁹ We thus find no basis for concluding that each network element must be functionally independent of other network elements.

43. We reject as well Ameritech's contention that a network element must be identifiable as a limited or pre-identified portion of the network. We find nothing in the statutory definition of network elements that prohibits requesting telecommunications carriers from seeking access to every transport facility within the incumbent's network. Our definition of signalling as a network element does not require requesting carriers to identify in advance a particular portion of the incumbent LEC's signalling facilities, but instead permits requesting carriers to obtain access to multiple signalling links and signalling transfer points in the incumbent LEC's network on an as-needed basis.¹¹⁰ We also reject Ameritech's assertion that shared transport cannot be physically separated from switching.¹¹¹ Both dedicated and shared transport facilities are transport links between switches. These links are physically distinct from the end office and tandem switches themselves.

¹⁰⁷ See 47 C.F.R. § 51.319(e). See also *Iowa Utilities Bd.* at *18 (affirming determination that signalling and databases are network elements).

¹⁰⁸ See Ameritech Opposition at 7 and Bell South Reply at 6. Ameritech also contends that incumbent LECs are not required to provide bundled services at cost-based rates under section 251(c)(3) and section 252(d)(1). See Ameritech Opposition at 7.

¹⁰⁹ *Local Competition Order*, 11 FCC Rcd at 15691, para. 380.

¹¹⁰ See generally *Local Competition Order*, 11 FCC Rcd at 15738-41, paras. 479-483.

¹¹¹ See May 9, 1997 *ex parte* from Jim Smith, Director, Federal Relations, Ameritech, to William Caton, Acting Secretary, FCC, attaching Supplemental Rebuttal Testimony of David H. Gebhardt at 2 (Gebhardt Supplemental Rebuttal Testimony).

44. Although we conclude that shared transport is physically severable from switching, incumbent LECs may not unbundle switching and transport facilities that are already combined, except upon request by a requesting carrier. Although, the Eighth Circuit struck down the Commission's rule that required incumbent LECs to rebundle separate network elements,¹¹² the court nevertheless stated that it: "upheld the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into the local phone markets by requiring incumbent LECs to make their networks available to . . . competing carriers."¹¹³ Among other things, the court left in effect section 51.315(b) of the Commission's rules, which provides that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."¹¹⁴ Therefore, although incumbent LECs are not required to combine transport and switching facilities to the extent that those elements are not already combined, incumbent LECs may not separate such facilities that are currently combined, absent an affirmative request. In addition to violating section 51.315(b) of our rules, such dismantling of network elements, absent an affirmative request, would increase the costs of requesting carriers and delay their entry into the local exchange market, without serving any apparent public benefit. We believe that such actions by an incumbent LEC would impose costs on competitive carriers that incumbent LECs would not incur, and thus would violate the requirement under section 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled elements. Moreover, an incumbent LEC that separates shared transport facilities that are already connected to a switch would likely disrupt service to its own customers served by the switch because, by definition, the shared transport links are also used by the incumbent LEC to serve its customers. Thus, incumbent LECs would seem to have no network-related reason to separate network elements that it already combines absent a request.

45. We likewise reject Ameritech's contention that purchasing access to the switch as a network element does not entitle a carrier to use the routing table located in that switch.¹¹⁵ According to Ameritech, vendors provide switches that are capable of acting on routing instructions, but the switch itself does not include routing instructions; those instructions are added by the carrier after it purchases the switch from the vendor and are contained in a routing table resident in the switch. Ameritech asserts that its routing tables are proprietary products, and "are not a feature of the switch."¹¹⁶ In the *Local Competition Order*, we

¹¹² *Iowa Utilities Bd.* at *25. See also 47 C.F.R. § 51.315(c)-(f) (vacated rules).

¹¹³ *Iowa Utilities Bd.* at *28.

¹¹⁴ 47 C.F.R. § 51.315(b).

¹¹⁵ Gebhardt Supplemental Rebuttal Testimony at 6-7.

¹¹⁶ Gebhardt Supplemental Rebuttal Testimony at 6-7.

determined that "we should not identify elements in rigid terms, but rather by function."¹¹⁷ Routing is a critical and inseverable function of the local switch. One of the most essential features a switch performs is to provide routing information that sends a call to the appropriate destination. We find no support in the statute, the *Local Competition Order*, or our rules for Ameritech's assertion that the switch, as a network element, does not include access to the functionality provided by an incumbent LEC's routing table. In fact, the only question addressed in the *Local Competition Order* was whether requesting carriers could obtain *customized* routing, that is, routing different from the incumbent LEC's existing routing arrangements.¹¹⁸

46. We further find that access to unbundled switching is not necessarily limited to the product the incumbent LEC originally purchased from a vendor. As we noted in the *Local Competition Order*, incumbent LECs may in some instances be required to modify or condition a network element to accommodate a request under section 251(c)(3).¹¹⁹ Moreover, we held that unbundled local switching includes access to the vertical features of the switch, regardless of whether the vertical features were included in the switch when it was purchased, or whether the vertical features were purchased separately from the vendor or developed by the incumbent.¹²⁰ We held that network elements include physical facilities "as well as logical features, functions, and capabilities that are provided by, *for example, software located in a physical facility such as a switch.*"¹²¹ We also note that the Eighth Circuit affirmed the Commission's interpretation of the Act's definition of "network elements." The court stated that "the Act's definition of network elements is not limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B" and that the Act's definition explicitly made reference to "databases, signaling systems, and information sufficient for billing and collection."¹²² Thus, just as databases and signaling systems may include software created by the incumbent LEC, which must be made available to competitive carriers purchasing those elements on an unbundled basis, we believe that the

¹¹⁷ *Local Competition Order*, 11 FCC Rcd at 15631-32, para. 259.

¹¹⁸ *Local Competition Order*, 11 FCC Rcd at 15709, para. 418. We concluded that incumbent LECs must offer customized routing unless they prove to the state commission that doing so would not be technically feasible in a particular switch.

¹¹⁹ See, e.g., *Local Competition Order*, 11 FCC Rcd at 15692, para. 382. This determination was specifically "endorsed" by the Eighth Circuit. *Iowa Utilities Bd.* at *32, n.33. See also 47 C.F.R. § 51.307.

¹²⁰ See generally *Local Competition Order*, 11 FCC Rcd at 15706, para. 412. See also 47 C.F.R. § 51.319(c)(1)(i)(C).

¹²¹ *Local Competition Order*, 11 FCC Rcd at 15632, para. 260 (emphasis added).

¹²² *Iowa Utilities Bd.* at *20.

routing table created by the incumbent LEC that is resident in the switch must be made available to requesting carriers purchasing unbundled switching. Finally, we note that Ameritech is the only incumbent LEC that has argued in this record that the routing table is not included in the unbundled local switching element. Other incumbent LECs have stated that they offer shared transport in conjunction with unbundled local switching.¹²³ This suggests that other incumbent LECs recognize that the routing table is a feature, function, or capability of the switch.

47. We also disagree with Ameritech's and BellSouth's argument that defining the unbundled network element shared transport as all transport links between any two incumbent LEC switches would be inconsistent with Congress's intention to distinguish between resale services and unbundled network elements. Section 251(c)(3) requires incumbent LECs to make available unbundled network elements at cost-based rates; sections 251(c)(4) and 252(d)(3) require incumbent LECs to make available for resale, at retail price less avoided costs, services the incumbent LEC offers to retail users. In the *Local Competition Order*, we held that a key distinction between section 251(c)(3) and section 251(c)(4) is that a requesting carrier that obtains access to unbundled network elements faces greater risks than a requesting carrier that only offers services for resale.¹²⁴ A requesting carrier that takes a network element dedicated to that carrier, and recovered on a flat-rated basis, must pay for the cost of the entire element, regardless of whether the carrier has sufficient demand for the services that the element is able to provide. The carrier thus is not guaranteed that it will recoup the costs of the element. By contrast, a carrier that uses the resale provision will not bear the risk of paying for services for which it does not have customers.¹²⁵ In particular, a requesting carrier that takes an unbundled local switch must pay for all of the vertical features included in the switch, even if it is unable to sell those vertical features to end user customers.¹²⁶ Requesting carriers that purchase shared transport as a network element to provide local exchange service must also take local switching, for the practical reasons set forth herein, and consequently will be forced to assume the risk associated with switching.¹²⁷

¹²³ See n.77 *supra*.

¹²⁴ *Local Competition Order*, 11 FCC Rcd at 15668-69, para. 334.

¹²⁵ *Iowa Utilities Bd.* at *26-27.

¹²⁶ *Local Competition Order*, 11 FCC Rcd at 15707-08, para. 414.

¹²⁷ A requesting carrier that uses its own self-provisioned local switches, rather than unbundled local switches obtained from an incumbent LEC, to provide local exchange and exchange access service would use dedicated transport facilities to carry traffic between its network and the incumbent LEC's network. Thus, the only carrier that would need shared transport facilities would one that was using an unbundled local switch.

48. BellSouth's argument, that assessing a usage-sensitive rate for shared transport would be inconsistent with the 1996 Act because it would not reflect the manner in which costs are incurred, is similarly unpersuasive. BellSouth's argument is premised on the assumption that incumbent LECs would be required to provide shared transport over facilities between the tandem switch and the serving wire center. In this order, however, we make clear that incumbent LECs are required to provide transport on a dedicated, but not on a shared basis, over transport facilities between the incumbent LEC's tandem and the serving wire center. Thus, BellSouth's concern is misplaced.

49. We also find that there is no element in the incumbent LEC's network that is an equivalent substitute for the routing table. We agree with Ameritech that requesting carriers could duplicate the shared transport network by purchasing dedicated facilities. But in that instance, requesting carriers would be forced to develop their own routing instructions, and would not be utilizing a portion of the incumbent LEC's network to substitute for the routing table. In the *Local Competition Order*, we specifically rejected the suggestion that an incumbent LEC is not required to provide a network element if a requesting carrier could obtain the element from a source other than the incumbent LEC.¹²⁸ The Eighth Circuit affirmed the Commission's conclusion.¹²⁹

50. Furthermore, we find that, at this stage of competitive entry, limiting shared transport to dedicated transport facilities, as Ameritech suggests, would impose unnecessary costs on new entrants without any corresponding, direct benefits. AT&T and Ameritech have both presented evidence regarding the costs of dedicated transport facilities linking every end office and tandem in a incumbent LEC's network as significant relative to the cost of "shared transport." For example, AT&T contends that the cost is \$.041767 per minute for dedicated transport plus associated non-recurring charges (NRCs).¹³⁰ AT&T claims that Ameritech would charge a total of \$5008.58 per DS1 (including administrative charges and connection charges) and \$58,552.87 per switch (including customized routing and billing development).¹³¹ AT&T argues that this compares with \$.000776 per minute for unbundled shared transport.¹³²

¹²⁸ *Local Competition Order*, 11 FCC Rcd at 15643-44, paras. 286-87. We found that requiring incumbent LECs to provide an element only where it is unavailable from any other source would nullify section 251(c)(3) because any new entrant, theoretically, could duplicate the incumbent LEC's entire network. Congress recognized that such duplication could delay entry and might be inefficient.

¹²⁹ *Iowa Utilities Bd.* at *22.

¹³⁰ Letter from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, March 20, 1997 (AT&T Mar. 20 *Ex Parte*).

¹³¹ AT&T Mar. 20 *Ex Parte*.

¹³² AT&T Mar. 20 *Ex Parte*.

Ameritech, on the other hand, contends the use of tandem routed dedicated facilities cost is \$.0031148 per minute plus associated NRCs.¹³³ Ameritech claims that the nonrecurring charges per DS1 are \$2769.27 (including administrative charges per order). Ameritech states that other NRCs include two trunk port connection charges (\$770.29 initial, \$29.16 subsequent), service ordering charge per occasion (\$398.72 initial, \$17.37 subsequent), billing development charge per switch (\$35,328.87), custom routing charge, per line class code per switch (\$232.24), and a service order charge (\$398.73).¹³⁴ Nevertheless, under either AT&T's or Ameritech's cost calculations for dedicated transport, we conclude that the relative costs of dedicated transport, including the associated NRCs, is an unnecessary barrier to entry for competing carriers.

51. We also find that limiting shared transport to dedicated facilities, as defined by Ameritech, would be unduly burdensome for new entrants. First, we agree with MCI, AT&T, et al., that a new entrant may not have sufficient traffic volumes to justify the cost of dedicated transport facilities.¹³⁵ Second, a new entrant entering the local market with smaller traffic volumes would have to maintain greater excess capacity relative to the incumbent LEC in order to provide the same level of service quality (i.e., same level of successful call attempts) as the incumbent LEC.¹³⁶ As a new entrant gains market share and increased traffic volumes for local service, however, the relative amount of excess capacity necessary to prevent blocking should decrease. We do not rule out the possibility, therefore, that, once new entrants have had a fair opportunity to enter the market and compete, we might reconsider incumbent LECs' obligations to provide access to the routing table.¹³⁷

52. As discussed above, requesting carriers may use shared transport to provide exchange access service to customers for whom they also provide local exchange service.

¹³³ Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, Mar. 28, 1997 (Ameritech Mar. 28 *Ex Parte*).

¹³⁴ Ameritech Mar. 28 *Ex Parte*.

¹³⁵ See n. 53 *supra*.

¹³⁶ See William W. Sharkey, *The Theory of Natural Monopoly* 184-85, (1982) ("that for a given number of circuits the economies [of scale] are more pronounced at higher grades of service (lower blocking probability). The economies of scale, however, decline substantially as the number of circuits increases. Therefore for small demands a fragmentation of the network could result in a significant cost penalty, because more circuits would be required to maintain the same grade of service. At larger demands the costs of fragmentation are less pronounced.") (emphasis added).

¹³⁷ As we held in the *Local Competition Order*, "the plain language of section 251(d)(2), and the standards articulated there, give us the discretion to limit the general obligation imposed by section 251(c)(3), but they do not require us to do so." *Local Competition Order*, 11 FCC Rcd at 15643-44, para. 286.

Several competing carriers contend that an interexchange carrier (IXC) has the right to select a requesting carrier that has purchased unbundled shared transport to provide exchange access service.¹³⁸ The carriers further contend that, if the IXC selects a requesting carrier, rather than the incumbent LEC, as the exchange access provider, the competing carrier is entitled to bill the IXC for the access services associated with shared transport. We find that a requesting carrier may use shared transport facilities to provide exchange access service to originate or terminate traffic to its local exchange customers, regardless of whether the requesting carrier or another carrier is the IXC for that traffic. We further conclude that a requesting carrier that provides exchange access service to another carrier is entitled to assess access charges associated with the shared transport facilities used to transport the traffic. We believe that this necessarily follows from our decision in the *Local Competition Order*¹³⁹ where we stated that:

[W]here new entrants purchase access to unbundled network elements to provide exchange access services, whether or not they are also offering toll services through such elements, the new entrants may assess exchange access charges to IXCs originating or terminating toll calls on those elements. In these circumstances, incumbent LECs may not assess exchange access charges to IXCs because the new entrants, rather than the incumbents, will be providing exchange access services¹⁴⁰

We therefore find that requesting carriers that provide exchange access using shared transport facilities to originate and terminate local exchange calls may also use those same facilities to provide exchange access service to the same customers to whom the requesting carrier is providing local exchange service. Requesting carriers are then entitled to assess access charges to interexchange carriers that use the shared transport facilities to originate and terminate traffic to the requesting carrier's customers.

¹³⁸ Letter from Bruce D. Cox, Government Affairs Vice President for AT&T, to William F. Caton, Acting Secretary, FCC, July 11, 1997; WorldCom June 27 *Ex Parte*.

¹³⁹ In the *Local Competition Order*, we adopted a limited, transitional plan to address public policy concerns raised by the potential for requesting carriers to bypass access charges through the use of unbundled network elements. See *Local Competition Order* at 15862-69, paras. 716-32. Our authority to adopt that interim plan generally was upheld in *Competitive Telecommunications Association v. FCC*, although the court noted that the Commission lacks authority to decide whether carriers are obligated to continue to pay intrastate access charges. *Competitive Telecommunications Association v. FCC*, 1997 WL 352284 (8th Cir. June 27, 1997) at *6, n.5. Outside the scope of that transitional plan, however, we held that parties that use network elements to provide interexchange or exchange access services are not required to pay access charges. *Local Competition Order*, 11 FCC Rcd at 15682, para. 363; *Access Charge Reform Order* at paras. 339-340.

¹⁴⁰ *Local Competition Order*, 11 FCC Rcd at 15682, para. 363 n.772.

E. Final Regulatory Flexibility Analysis

53. As required by the Regulatory Flexibility Act (RFA),¹⁴¹ the Commission issued a Final Regulatory Flexibility Analysis (FRFA) in its *Local Competition Order* in this proceeding.¹⁴² None of the petitions for reconsideration filed in Docket No. 96-98 specifically address, or seek reconsideration of, that FRFA. This present Supplemental Final Regulatory Flexibility Analysis addresses the potential effect on small entities of the rules adopted pursuant to the *Third Order on Reconsideration* in this proceeding, *supra*. This Supplemental FRFA incorporates and adds to our FRFA.

54. *Need for and Objectives of this Third Order on Reconsideration and the Rules Adopted Herein.* The need for and objectives of the rules adopted in this *Third Order on Reconsideration* are the same as those discussed in the *Local Competition Order's* FRFA "Summary Analysis of Section V Access to Unbundled Network Elements."¹⁴³ In general, our rules adopted in Section V were intended to facilitate the statutory requirement that incumbent local exchange carriers (LECs) are required to provide nondiscriminatory access to unbundled network elements.¹⁴⁴ In this *Third Order on Reconsideration*, we grant in part and deny in part the petitions filed for reconsideration and/or clarification of the *Local Competition Order*, in order to further the same needs and objectives. We conclude that the duty of incumbent LECs to provide access to unbundled network elements also includes the provision of "shared transport" as an unbundled network element between end offices, even if tandem switching is not used to route the traffic. We also hold that the term "shared transport" refers to all transmission facilities connecting an incumbent LEC's switches -- that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches. We conclude that incumbent LECs are obligated under Section 251(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 251(d)(2), to provide access to both their interoffice transmission facilities and their routing tables contained in the incumbent LEC's switches. Finally, we conclude that a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service.

¹⁴¹ See 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁴² *Local Competition Order*, 11 FCC Rcd at 16143-80, paras. 1324-441.

¹⁴³ *Local Competition Order* at 16161, paras. 1374-1383.

¹⁴⁴ *Local Competition Order* at 16161, para. 1374.

55. *Description and Estimate of the Number of Small Entities To Which the Rules Will Apply.* In determining the small entities affected by our *Third Order on Reconsideration* for purposes of this Supplemental FRFA, we adopt the analysis and definitions set forth in the FRFA in our *Local Competition Order*.¹⁴⁵ The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by the rules we have adopted. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.¹⁴⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁴⁷ The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.¹⁴⁸ Consistent with our FRFA and prior practice, we here exclude small incumbent local exchange carriers (LECs) from the definition of "small entity" and "small business concern."¹⁴⁹ While such a company may have 1500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

56. In addition, for purposes of this Supplemental FRFA, we adopt the FRFA estimates of the numbers of telephone companies, incumbent LECs, and competitive access providers (CAPs) that might be affected by the *Local Competition Order*. In the FRFA, we determined that it was reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that might be affected.¹⁵⁰ We further estimated that there are fewer than 1,347 small incumbent LECs that might be

¹⁴⁵ See *Local Competition Order* at 16149-57, paras. 1341-60.

¹⁴⁶ See 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

¹⁴⁷ 15 U.S.C. § 632.

¹⁴⁸ *Id.* (citing 13 C.F.R. § 121.201).

¹⁴⁹ See *Local Competition Order*, 11 FCC Rcd at 16150, para. 1342.

¹⁵⁰ *Local Competition Order* at 16150, para. 1343.

affected.¹⁵¹ Finally, we estimated that there were fewer than 30 small entity CAPs that would qualify as small business concerns.¹⁵²

57. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* As a result of the rules adopted in the *Third Order on Reconsideration*, we require incumbent LECs to provide requesting carriers with access to the same shared transport for all transmission facilities connecting incumbent LECs' switches. No party to this proceeding has suggested that changes in the rules relating to access to unbundled network elements would affect small entities or small incumbent LECs. We determine that complying with this rule may require use of engineering, technical, operational, accounting, billing, and legal skills. For example, a new entrant may be required to combine its own interoffice facilities with those of the incumbent LEC, or be required to combine purchased unbundled network elements into a package unique to its own needs.

58. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As stated in our FRFA, we determined that our decision to establish minimum national requirements for unbundled elements should facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.¹⁵³ National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision in the *Local Competition Order*. As stated above, no petitioner has challenged this finding. We further find that our new rules, which clarify the definition of "shared transport," will likely ensure that small entities obtain the unbundled elements that they request.

59. **Report to Congress:** The Commission will send a copy of the *Third Order on Reconsideration*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). A copy of the *Third Order on Reconsideration* and this supplemental FRFA (or summary thereof) will also be published in the Federal Register, see 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Discussion

¹⁵¹ *Local Competition Order* at 16151, para. 1345.

¹⁵² *Local Competition Order* at 16151, para. 1347.

¹⁵³ *Local Competition Order* at 16162, para 1376.

60. In the *Local Competition Order*, we did not condition use of network elements on the requesting carrier's provision of local exchange service to the end-user customer. We recognized, however, that, as a practical matter, a requesting carrier using certain network elements would be unlikely to obtain customers unless it offered local exchange service as well as exchange access service over those network elements. In particular, we found that local loops are dedicated to the premises of a particular customer.¹⁵⁴ Therefore, we stated that a requesting carrier would need to provide all services requested by the customer to whom the local loops are dedicated, and that, as a practical matter, requesting carriers usually would need to provide local exchange service over any unbundled local loops that it purchases under section 251(c)(3).¹⁵⁵ We similarly held in our *Order on Reconsideration* that the unbundled switch, as defined in the *Local Competition Order*, includes the line card, which is typically dedicated to a particular customer. We concluded that:

Thus, a carrier that purchases the unbundled switching element to serve an end user effectively obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user. A practical consequence of this determination is that the carrier that purchases the local switching element is likely to provide all available services requested by the customer served by that switching element, including switching for local exchange and exchange access.¹⁵⁶

61. Neither of the petitions for reconsideration expressly asked the Commission to determine whether requesting carriers may purchase shared transport facilities under section 251(c)(3) of the Act to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service.¹⁵⁷ Moreover, the oppositions and replies to the two petitions for reconsideration, as well as the *ex partes*, focused on the issue of whether requesting carriers may use unbundled shared transport facilities, in conjunction

¹⁵⁴ *Local Competition Order*, 11 FCC Rcd at 15679, para. 357.

¹⁵⁵ *Local Competition Order*, 11 FCC Rcd at 15679, para. 357.

¹⁵⁶ *Order on Reconsideration*, 11 FCC Rcd at 13048, para. 11.

¹⁵⁷ See, e.g., WorldCom Petition at 6 (new local entrants may need to use shared transport facilities between end offices as well as between an end office and a tandem); WorldCom Opposition at 4 (contending that requesting carriers that purchase unbundled local switching should be able to route calls over the same facilities the incumbent LEC uses to transport its traffic); LECC Petition at 33 ("the Order requires incumbent LECs to provide unbundled access to shared transmission facilities between end offices and tandem switches . . . [t]he Commission, however, should clarify that such shared transmission facilities may be provided to a requesting carrier only in conjunction with local switching and tandem capability).

with unbundled switching, to compete in the local exchange market.¹⁵⁸ In fact, the issue of whether requesting carriers may purchase unbundled shared transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service was specifically addressed only in two recent *ex parte* submissions.¹⁵⁹ In order to develop a complete record on this issue, we issue this further notice of proposed rulemaking specifically asking whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service. Absent restrictions requiring carriers to provide local exchange service in order to purchase unbundled shared or dedicated transport facilities, an IXC, for example, could request shared or dedicated transport under section 251(c)(3) for purposes of carrying originating interstate toll traffic between an incumbent LEC's end office and the IXC's point of presence (POP). Likewise, an IXC could request such transport network elements for purposes of terminating interstate toll traffic from its POP to an incumbent LEC's end office. Parties that advocate the use of transport network elements for the transmission of such access traffic should address whether that approach is consistent with our *Order on Reconsideration* regarding the use of the unbundled local switching element to provide interstate access service¹⁶⁰ as well as recent appellate court decisions interpreting section 251(c)(2) and (3).¹⁶¹ Parties that advocate restricting the use of transport network elements should address whether such restrictions are consistent with section 251(c)(3) of the Act, which requires an incumbent LEC to provide access to unbundled network elements "for the provision of a telecommunications service." Moreover, those parties should also address the technical feasibility of requiring an IXC to identify terminating toll traffic that is destined for customers that are not local exchange customers of the incumbent LEC.

B. Procedural Matters

1. Ex Parte Presentations

¹⁵⁸ WorldCom April 16 *Ex Parte* (asserting that carriers that purchase unbundled local switching have the right to use incumbent LECs' interoffice transport facilities to complete local calls); AT&T Jan. 28 *Ex Parte* (noting that the Commission had held that carriers that seek to enter the local exchange market should be able to take advantage of the incumbent LEC's economies of scale); Bell Atlantic Reply at 10 (requesting carriers are entitled to purchase shared transport in conjunction with local switching to route local calls).

¹⁵⁹ WorldCom June 27 *Ex Parte*; NYNEX July 18 *Ex Parte*.

¹⁶⁰ *Order on Reconsideration*, 11 FCC Rcd at 13048-49, para. 12-13.

¹⁶¹ *CompTel*, 11 F.3d at 1073-75; *Iowa Utilities Bd.* at n. 20.